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M. S. L. C.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 499

META BIDDLE ROBINETTE, PETITIONER,

vs.

**GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE**

No. 500

EELISE BIDDLE PAUMGARTEN, PETITIONER,

vs.

**GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE**

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 29, 1942.

CERTIORARI GRANTED DECEMBER 7, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 499

META BIDDLE ROBINETTE, PETITIONER,

vs.

**GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE**

No. 500

ELISE BIDDLE PAUMGARTEN, PETITIONER,

vs.

**GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE**

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT**

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BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

META BIDDLE ROBINETTE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Henry A. Mulcahy, Esq.

For Comm'r: Eugene G. Smith, Esq.

DOCKET ENTRIES

1940

May 28. Petition received and filed. Taxpayer notified. Fee paid.

May 28. Copy of petition served on General Counsel.

Jul. 25. Answer filed by General Counsel.

Jul. 25. Request for hearing in Philadelphia filed by General Counsel.

Jul. 27. Notice issued placing proceeding on Philadelphia, Pa. calendar. Answer and request served.

Oct. 11. Hearing set Dec. 2, 1940 in Philadelphia, Pa.

Dec. 5. Hearing had before Mr. Sternhagen on the merits. Submitted. Motion to consolidate with docket 103010 granted. Stipulation as to the facts filed. Briefs due 1/20/41—reply 2/4/41.

Dec. 26. Transcript of hearing of 12/5/40 filed.

1941

Jan. 16. Motion for extension to Feb. 1, 1941 to file brief filed by General Counsel.

Jan. 21. Brief filed by taxpayer. (Signed copy rec'd 1/25/41.)

Jan. 30. Brief lodged by General Counsel.

Jan. 31. Motion for extension to Feb. 1, 1941 to file brief, filed by General Counsel granted to 1/31/41.

Feb. 1. Copy of brief served on General Counsel.

Feb. 4. Motion for extension to Feb. 18, 1941 to file reply brief filed by taxpayer. 2/5/41 granted.

Feb. 18. Reply brief filed by taxpayer.

Jun. 10. Findings of fact and opinion rendered, Sternhagen, Div. 10. Decision will be entered under Rule 50. 6/10/41 copy served.

Jun. 27. Computation of deficiency filed by General Counsel.

Jun. 30. Hearing set July 16, 1941 on settlement.

Jul. 2. Consent to settlement filed by taxpayer.

Jul. 8. Decision entered, Sternhagen, Div. 10.

Sept. 24. Petition for review by U. S. Circuit Court of Appeals, Third Circuit, filed by General Counsel.

Sept. 26. Proof of service filed.

Oct. 6. Proof of service filed.

Oct. 23. Motion for extension to 12/23/41 to prepare and transmit record filed by General Counsel.

Oct. 23. Order enlarging time to December 23, 1941 to prepare and transmit record entered.

Nov. 29. Statement of points filed by General Counsel, proof of service thereon.

Nov. 29. Agreed statement of evidence filed.

Nov. 29. Agreed designation of contents of record filed. [fol. 1a] Dec. 3. Certified copy of order from Third Circuit consolidating for briefing, hearing, argument and decision upon a single consolidated transcript of record filed.

[fol. 2]

[File endorsement omitted]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

[Title omitted]

PETITION—Filed May 28, 1940

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency MT-ET-GT-1197-36-1st Pennsylvania, dated March 12, 1940, and, as a basis of her proceeding, alleges as follows:

1. The petitioner is an individual residing at No. 12 East Chestnut Avenue, Chestnut Hill, Philadelphia, Pennsylvania. The return for the period here involved was filed

with the Collector for the First District of Pennsylvania on March 15, 1937.

{fol. 3} 2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 12, 1940, as petitioner believes.

3. The taxes in controversy are gift taxes for the calendar year 1936, and in the amount of \$3,155.57.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner of Internal Revenue erred in determining that the transfer made by petitioner of the corpus or principal of the Trust Indenture, dated January 14, 1936, constituted a taxable gift within the meaning of Section 501 of the Revenue Act of 1932, as amended.

b. The Commissioner of Internal Revenue erred in determining that the petitioner had relinquished *in praesenti* her title, dominion and control of the corpus or principal transferred under the Trust Indenture, dated January 14, 1936.

c. The Commissioner of Internal Revenue erred in his determination of the value of the property transferred under the Trust Indenture, dated January 14, 1936.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

{fol. 4} a. On January 14, 1936, petitioner executed an Indenture of Trust and conveyed certain property to others, as Trustees, to pay the income therefrom to petitioner for life, and, on her death, to others for their lives, and on termination of the life estates, to pay over and distribute the corpus or principal of the trust to the issue of the petitioner's daughter Elise Biddle Robinson. On the date of execution and creation of the trust, petitioner's daughter Elise Biddle Robinson was unmarried and without issue.

b. On January 14, 1936, the date of execution of the transfer in trust, there was no donee in existence to accept the purported gift, which acceptance is necessary to establish a gift *inter vivos*.

c. The Trust Indenture provides that, in default of issue of petitioner's daughter Elise Biddle Robinson, the corpus

4
or principal of the trust is to be paid and distributed to such persons, in such proportions, and for such estates as petitioner, or Edward B. Robinette, or Elise Biddle Robinette, whichever of said three shall be the survivor, may by Last Will and Testament appoint.

d. The power of appointment reserved by petitioner negatives the relinquishment *in praesenti* of dominion and control of the corpus or principal necessary to establish the purported gift *inter vivos*.

e. The transfer made by petitioner under the Trust Indenture, dated January 14, 1936, did not constitute an absolute and complete *inter vivos* transfer *in praesenti* within the meaning of Section 501 of the Revenue Act of 1932, as amended:

f. The valuation of the property transferred by petitioner in trust on January 14, 1936, as determined by the Commissioner of Internal Revenue did not constitute the fair market value thereof on date of transfer.

[fol. 5] Wherefore, petitioner prays that this Board may hear the proceedings and determine:

1. That the transfer in trust made by petitioner by Indenture, dated January 14, 1936, is not a gift taxable to petitioner.

2. That there is no deficiency in gift tax owed by petitioner for the calendar year 1936.

3. That the petitioner has overpaid her gift taxes for the calendar year 1936; and that the recovery of such overpayment is not barred by the Statute of Limitations.

4. Such other and further relief as this Board may deem just and proper.

Henry A. Mulcahy, Counsel for Petitioner, 50 Broadway, New York City, New York.

[fol. 6] Duly sworn to by Meta Biddle Robinette. Jurat omitted in printing.

[fol. 7]

EXHIBIT "A" TO PETITION

March 12, 1940.

MT-ET-GT-1197-36-1st Pennsylvania
Donor—Meta Biddle Robinette

Meta Biddle Robinette,
12 East Chestnut Avenue,
Chestnut Hill, Philadelphia, Pa.

DEAR MADAM:

You are advised that the determination of your gift tax liability for the calendar year 1936 discloses a deficiency of \$3,155.57, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Philadelphia, Pa., for the attention of the Chief Estate Tax Officer. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, which ever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by
— — —, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

[fol. 8] Donor—Meta Biddle Robinette
Year of Gift—1936

Statement

\$193,546.00 (value of property transferred) x .53931, remainder factor for age 55 = \$104,381.24, value of gift.

	Revised	Recommended	Adjustment
Total gifts, 1936.....	\$ 0.00	\$17,000.00	\$16,361.39
Less exclusions	0.00	0.00	0.00
Amount included	0.00	17,000.00	16,361.39
Less specific exemption.....	0.00	40,000.00	40,000.00
Net gifts, 1936	\$ 0.00	\$17,000.00	\$61,361.39
Tax on net gifts	\$ 0.00	\$396.75	\$1,544.87
Increase (additional deficiency).....			\$2152.12

[fol. 9]

[File endorsement omitted]

UNITED STATES BOARD OF TAX APPEALS

Docket No. 103000

[Title omitted]

Answer—Filed July 25, 1940

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenschel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.
2. Admits the allegations of paragraph 2 of the petition.
3. Admits the allegations of paragraph 3 of the petition.
4. a, b, c Denies the allegations of paragraphs 4 a, b, and c of the petition.
5. a. Admits that on January 14, 1936, the petitioner executed an Indenture of Trust and conveyed certain property to trustees; denies the remaining allegations of paragraph 5 a of the petition.
- b to f. Denies the allegations of paragraphs 5 b to f, inclusive, of the petition.
6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

[fol. 10] Wherefore, it is prayed that the petition be denied.

(Signed) J. P. Wenschel, A., Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Hartford Allen, Division Counsel; Eugene G. Smith, Special Attorney, Bureau of Internal Revenue.

[fol. 11]. BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

[Title omitted]

AGREED STATEMENT OF FACTS—Filed December 3, 1940

It is Hereby Stipulated and Agreed by and between the petitioner and the respondent, by their respective counsel, that the following facts shall be taken as true for the purposes of the above entitled proceeding, with leave to either party to introduce other and further evidence not inconsistent with the facts herein stipulated:

1. The petitioner is an individual residing in Philadelphia, Pennsylvania. On January 14, 1936, the date petitioner executed the Indenture of Trust hereinafter described, she was fifty-five (55) years of age.

2. That on January 14, 1936, the petitioner, as Grantor, and The Pennsylvania Company for Insurance on Lives and Granting Annuities, Edward B. Robinette, and George Earle Robinette, all of the City of Philadelphia, Pennsylvania, as Trustees, entered into an irrevocable Indenture of [fol. 12] Trust, a true copy of which is attached hereto and made a part hereof, marked Exhibit "A".

3. That on January 14, 1936, the petitioner, pursuant to the provisions of the Indenture of Trust, assigned, transferred and set over unto the Trustees the property set forth in Schedule A annexed to and made a part of said Indenture, of the then market value of \$193,546.00.

4. Under the terms of the Trust Indenture, the Trustees are to pay the entire income from the trust to the petitioner during her life, and on her death to pay over and distribute the net income monthly to Edward B. Robinette, her husband, and on his death to pay the net income monthly to Elise Biddle Robinson, her daughter, for the term of her natural life.

5. Under the terms of the Trust Indenture, the Trustees are directed, on the termination of the life estates aforementioned, to pay over and distribute the corpus or principal of the trust to the issue of Elise Biddle Robinson, to be divided among such issue *per stirpes* upon the attainment

by such issue, respectively, of the full age of twenty-one (21) years, and, in default of issue of Elise Biddle Robinson, then to such persons, in such proportions, and for such estates as petitioner, or Edward B. Robinette, or Elise Biddle Robinson; whichever of said three shall be the survivor, may, by Last Will and Testament duly proved and allowed, direct, limit and appoint.

[fols. 13-14] 6. On January 14, 1936, the date of the creation and execution of the aforementioned trust, Elise Biddle Robinson was thirty (30) years of age, unmarried and without issue.

7. The petitioner on March 15, 1937, filed a gift tax return for the calendar year 1936 in the office of the Collector of Internal Revenue for the First District of Philadelphia, Pennsylvania. The return filed by the petitioner disclosed the execution of the Trust Indenture on January 14, 1936, and disclaimed any gift tax liability thereunder.

8. Upon audit of said gift tax return, the respondent determined that a gift occurred as to the life estates transferred to Edward B. Robinette and Elise Biddle Robinson. Said life estates were valued at \$57,958.40, which resulted in a deficiency tax of \$388.75. Petitioner paid the alleged additional tax.

9. Thereafter and on or about March 12, 1940, the respondent, by a ninety-day letter, notified the petitioner of his determination that a gift occurred on January 14, 1936, as to the remainder interest under the trust, thereby resulting in an additional deficiency in tax of \$3,155.57. The value of the remainder was fixed at \$104,381.29, after applying the remainder factor .53931 for age 55 to the value of the property transferred. A true copy of said deficiency letter is attached to the petition herein, and by reference made a part hereof.

(Signed) Henry A. Mulcahy, Counsel for Petitioner.

(Signed) J. P. Wenchel-a, Chief Counsel, Bureau of Internal Revenue.

[fol. 15] EXHIBIT "A" TO AGREED STATEMENT OF FACTS

This Indenture, made this 14th day of January, 1934, by and between Meta Biddle Robinette, hereinafter called "Grantor", and The Pennsylvania Company For Insur-

ances On Lives And Granting Annuities, a corporation, and Edward B. Robinette and George Earle Robinette, herein-after collectively called "Trustees", all of the City of Philadelphia, Pennsylvania.

Witnesseth:

That Grantor for and in consideration of the sum of One Dollar (\$1.00) unto her in hand paid by Trustees at and before the en sealing and delivery hereof, receipt whereof is hereby acknowledged, and of the covenants and agreements herein contained, does hereby assign, transfer and set over unto Trustees, their successors and assigns, the items set forth in Schedule "A" hereto annexed and made a part hereof, together with such other sums of money, securities, life insurance policies or other property, real or personal, as may be delivered to Trustees or assigned or conveyed to them or their successors, or assigns by endorsement hereon or as may be otherwise by proper instrument or instruments, placed under the trust hereby created.

To Have And To Hold, receive and take such items set forth in said Schedule "A" or as may be hereafter delivered to Trustees or assigned or conveyed to them, their successors and assigns, *in trust*, nevertheless, for the following uses and purposes, and subject to all the terms hereof, viz:

In Trust, to hold, manage, invest, reinvest and keep invested the corpus or principal thereof in such manner as Trustees in their discretion shall deem proper, pursuant to the provisions hereof, as more particularly hereinafter set forth and not in limitation of the usual powers of Trustees, but in addition thereto, and to demand, collect and receive the interest, dividends, earnings and income therefrom and after the deduction of all proper or necessary charges or expenses, to pay over the net income therefrom [fol. 16] monthly for my account unto Edward B. Robinette and George Earle Robinette jointly, and upon the death of either, then unto the survivor alone, whom I hereby appoint as my Attorneys-in-Fact to collect and receipt for said net income, hereby ratifying and confirming all that my said attorneys or attorney shall lawfully do by virtue hereof. Notwithstanding the foregoing provision, I, the Grantor, reserve the right upon the death of both my Attorneys-in-Fact herein named, to constitute and appoint one or more Attorneys-in-Fact, to collect and receipt for said

net income, and my Trustees are hereby authorized to pay the same over to the person or persons so constituted and appointed by me and to take his or their receipt therefor.

In further trust, upon the death of Grantor, to pay over and distribute said net income monthly unto Edward B. Robinette, husband of Grantor, for the term of his natural life, and upon his death, to pay over and distribute said net income monthly to Elise Biddle Robinson, daughter of Grantor, for the term of her natural life:

In further trust, upon the death of Grantor, and upon the death of the survivor of said Edward B. Robinette and Elise Biddle Robinson, to pay over and distribute the corpus or principal of the trust hereby created, together with all accumulations thereon and additions thereto, to the issue of the said Elise Biddle Robinson, to be divided among such issue, per stirpes and not per capita, upon the attainment by such issue respectively, of the full age of twenty-one (21) years, with power to apply the distributive share of any minor distributee directly for the comfort, education, maintenance and support of such minor distributee without the intervention of any guardian; and in default of issue of the said Elise Biddle Robinson, then unto such persons, in such proportions and for such estates as Grantor or Edward B. Robinette or Elise Biddle Robinson, whichever of said three shall be the survivor, may, by Last [fol. 17] Will and Testament, duly proved and allowed, direct, limit and appoint.

The Trustees shall have the following powers and authority with respect to their management of the Trust, thereby created:

To retain any and all investments or other properties conveyed hereunder so long as Trustees shall deem proper and for the best interest of the trust estate hereby created and at any time or times to sell, dispose of and make valid transfer of the securities forming a part of the trust hereby created, and to invest the proceeds thereof from time to time in such stocks, securities and real estate as to them may seem proper, with due regard for the safety of the principal and a reasonable return of income therefrom, without confining Trustees to what are known as "legal investments" for trustees under the laws of the Commonwealth of Pennsylvania, and also to continue to sell and dispose of and transfer investments and reinvestments and reinvest the proceeds under like ample power, provided,

however, that so long as Edward B. Robinette and George Earle Robinette shall continue as Trustees hereunder, all sales of investments or other property and all investments and reinvestments and purchases of other property shall be subject to the absolute discretion of said Edward B. Robinette and said George Earle Robinette, to be exercised jointly by direction in writing signed by both and filed with the corporate Trustee herein named, and without liability to such corporate Trustee for acting according to such written direction. The term "securities" wherever used in this Indenture shall include shares of stock, common and/or preferred of any corporation.

To purchase investments and securities as aforesaid at a premium and to deduct such premium from income.

To sell, lease, mortgage, exchange or otherwise dispose of any or all of the real property, part of the Trust Fund, without application to any Court for permission so to do. Trustees shall have full power and authority to make, execute, acknowledge and deliver good and sufficient deeds, leases, mortgages, bills of sale, assignments or other instruments, whether under seal or otherwise, which Trustees [fol. 18] may deem necessary or expedient.

No mortgage, pledgee, assignee, vendee or other grantee of any part or all of Trust Fund shall be bound to see to the application or disposition of the proceeds thereof or to inquire into the validity, expediency or propriety thereof, or be affected by anything which the Trustees may do or omit to do or suffer to be done with respect to such proceeds.

To pay any and all interest or other charges on all or any part of the Trust Fund; to make any and all repairs and replacements necessary with respect thereto; and to insure the same against fire, theft or other casualty.

To cause the securities which may from time to time be in the Trust Fund to be registered in their names as Trustees or in the name of any nominee, or may keep the same in the name or names in which registered when received by Trustees.

To consent to the recapitalization, reorganization, consolidation or merger of any corporation, or to the sale or lease of its property or any portion thereof; or to the lease to it of any property; or to its dissolution; to deposit shares of stock and bonds held hereunder or exchange the same for the securities issued in connection with such corporate

action upon such terms and conditions as Trustees shall deem proper; pay all such assessments, subscriptions and other sums of moneys as Trustees may deem expedient for the protection of their interests as holder of any stocks, bonds, or securities of any other corporation; exercise any option contained in any stocks, bonds or securities for the conversion of the same into other securities; or to take advantage of any right to subscribe for stocks, bonds or securities; and generally exercise in connection with all such stocks, bonds or securities all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right; provided, however, that [fol. 19] these powers shall not impose any obligation upon the Trustees to do any of the acts aforementioned.

To employ counsel and agents and determine and pay them reasonable compensation. Trustees shall be entitled to reimbursement for the same and for such other expenses and charges as Trustees may deem necessary and proper to incur in connection with the administration of the trust, such amounts to be charged against income.

To pay any and all taxes which may properly become payable, from time to time, under the Laws of the United States or of any State, County or Municipality, on the Trust Fund or any part thereof, or for any transfer thereof or transfer affecting the same, and to affix and cancel tax stamps in accordance with the provisions of such laws.

Whenever under any of the provisions of this instrument the exercise of judgment or discretion by the Trustees becomes necessary or proper, any such exercise of judgment or discretion, if made in good faith, shall be final and conclusive and shall bind all persons interested in the trust estate, as then constituted, and shall be subject to review by no court or other authority.

Trustees shall not be required to give any bond or other security for the faithful performance of the duties of such Trustees hereunder, any law or rule of court now or hereafter in force to the contrary notwithstanding.

Trustees may, but shall not be required so to do, set aside any part of the Trust Fund as a Sinking Fund to retire or absorb the premium on any securities taken or purchased for the Trust Fund at a premium.

All stock dividends, and all other distributions of surplus made in any medium except cash that are received by Trus-

tees upon or in respect of any shares of stock of a corporation held in the Trust Fund, shall be deemed to be income [fol. 20] if distributed by such corporation periodically and in the nature of a regular distribution of surplus by such corporation wholly or partly in lieu of cash dividends. In all other cases the same shall be received and held by Trustees as a part of the principal of the Trust Fund, so far as legally permissible.

Trustees may give proxies and powers of attorney on shares held in the trust to any person or persons selected by them.

In case of the death or resignation of either Edward B. Robinette or George Earle Robinette, the other shall alone continue to exercise the discretion to direct sales and investments hereinabove granted. In case of the death or resignation of both said individual Trustees, one or more individual Trustees may be appointed by written instrument signed by the Grantor, and Edward B. Robinette and Elise Biddle Robinson, or such of them as shall be living at the time of such appointment, and such written instrument may continue or may remove or may in any way limit the discretionary powers of direction granted to the individual Trustees herein named.

In case of the resignation as Trustee of The Pennsylvania Company for Insurances on Lives and Granting Annuities, said persons or so many of them as shall be living at the time of such resignation, may, by instrument in writing, appoint a new corporate Trustee which shall be a Trust Company in either Philadelphia or New York.

All directions of every sort or kind for the payment by Trustees of income shall be taken and made upon the express direction in each and every case that the person so receiving income under this deed shall take such income to which he or she shall be entitled and also that the principal or corpus of the fund held in trust hereunder shall be so [fol. 21] held that such principal and income shall be free and clear of the debts, contracts, engagements, alienations, assignments and anticipations of each and every of the beneficiaries and free and clear from the lien of judgments recovered against any of them, and free from liability for all levies, judgments, executions and sequestrations issued against any such *cestuis que trustent*.

In Witness Whereof, Grantor has hereunto set her hand and seal the day and year first above written.

Meta Biddle Robinette (L. S.)

Signed, sealed and delivered in the presence of: C. W. Leon, Jr., Thomas A. Carlin.

Edward B. Robinette, George Earle Robinette and The Pennsylvania Company for Insurances on Lives and Granting Annuities accept the trust hereinbefore set forth and acknowledge receipt of the securities set forth in Schedule "A" hereto annexed this 21 day of January, A. D., One Thousand Nine Hundred and Thirty-Six.

Edward B. Robinette, George Earle Robinette, The Pennsylvania Company For Insurance On Lives And Granting Annuities. By ———

[fols. 22-25] STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

On the 14th day of January, A. D., 1936, before me, the subscriber, a Notary Public in and for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, personally appeared Meta Biddle Robinette, Grantor as aforesaid, who, in due form of law, acknowledged the foregoing Deed of Trust to be her act and deed and desired that the same might be recorded as such.

Witness, my hand and notarial seal the day and year first above written.

Bella Fox, Notary Public. My Commission Expires March 6, 1939. (Seal.)

Schedule "A" to Exhibit "A" omitted in printing:

[fol. 26] BEFORE UNITED STATES BOARD OF TAX APPEALS

META BIDDLE ROBINETTE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ELISE BIDDLE PAUMGARTEN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 103009, 103010. Promulgated June 10, 1941

By the creation of a trust whereby the income is to be paid to the settlor for life, then to two others for life, the property then to go to children, if any, when they reach twenty-one, or, if none, then to testamentary appointees of the settlor, *held*, the settlor is not subject to gift tax upon the value of the remainder.

Henry A. Mulcahy, Esq., for the petitioners.

Eugene G. Smith, Esq., for the respondent.

Findings of Fact and Opinion—June 10, 1941

The Commissioner determined gift tax deficiencies for 1936 of \$3,155.57 as to Meta Biddle Robinette, and \$25,044.94 as to Elise Biddle Paumgarten, by taxing certain remainder interests as gifts.

FINDINGS OF FACT

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a

concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan, the trust indentures were executed on January 14, [fol. 27] 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before.

Petitioner Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of \$193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death, to her daughter monthly for life. Upon the termination of the life estates, the trustees were to distribute the corpus to the issue of the daughter *per stirpes*, upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons, in such proportions, and for such estates as the survivor of the three should by will appoint.

At the same time, this petitioner executed a revocable trust indenture the provisions of which were the same as those of the irrevocable trust, and she transferred to the trustees certain securities.

Petitioner Elise Biddle Robinson, who was then 30 years old, executed an irrevocable trust indenture, the Girard Trust Co., Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of \$680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either, to the survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor *per stirpes*, upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions, and for such estates as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue.

At the same time, this petitioner executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned, except as to the amount and classification of the properties. To the trustees she transferred property having a market value of \$216,709.16. At the same time, she executed a revocable trust indenture to the same trustees, with the same provisions as the irrevocable trust, and transferred certain securities to the trustees.

The petitioners' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures, of January 14, 1936, and claimed there was no gift tax liability.

[fol. 28] The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at \$57,958.40, and assessed a tax of \$388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at \$48,635.52, and assessed a tax of \$129.53 against her, which she paid about January 29, 1940.

Thereafter, the respondent issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of \$3,155.57 against Meta Biddle Robinette and \$25,044.94 against Elise Biddle Robinson.

The value of the remainder in the Meta Biddle Robinette trust was fixed by respondent at \$104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by respondent at \$274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred.

OPINION

STERNHAGEN:

As to each petitioner, the Commissioner has determined a gift tax measured by the computed value of the remainder interest after the several life estates. The life estates

succeeding that of the settlor have been treated and taxed as gifts; and that is not in issue. The remainder was to go to Elise's children upon their attaining the age of twenty-one, respectively; and, if no children, then to the appointee by will of the survivor of the three, the daughter, her mother, and her stepfather. Thus, as to each grantor, there was a possible power of testamentary disposition of the remainder—a power as substantial as a reversion would be. If, for example, Elise, being thirty and unmarried when her trust was created, should fail to have children and should survive her mother and stepfather, both of whom were substantially older, she would have a power of testamentary appointment. Because of this retained interest, whether vested or contingent, the trust property would be included in her gross estate subject to estate tax. She had not so completely disposed of the property by means of the trust as to avoid the estate tax. *Helvering v. Hallock*, 309 U. S. 106. Until children were born, as they were, the settlor still had a possible power of disposition of the remainder, which is one of the most important attributes of ownership. Upon her death, if there were no issue, her testamentary power of appointment would be exercised if she were the last survivor, or that power would be freed [fol. 29] in the hands of her surviving mother or stepfather. So, when she created the trust she retained an interest in the property sufficient to warrant the expectation that it would be included in her gross estate upon her death.

According to *Sanford's Estate v. Commissioner*, 308 U. S. 39, the gift tax is a supplement to the estate tax. A transfer is to be taxed as a gift when it becomes complete and not while the transferor retains substantial control of the property. *Burnet v. Guggenheim*, 288 U. S. 280; *William J. McCormack*, 43 B. T. A. 924; *Carl J. Schmidlapp*, 43 B. T. A. 829; *Lorraine Manville Gould Dresselhuys*, 40 B. T. A. 30. Since in the event of death of the settlor the trust property would be included within her gross estate and subjected to estate tax, this is strong reason for denying a gift tax at the time of the transfer in trust. The creation of the life interests, it must be remembered, has been recognized as the occasion for the imposition of the gift tax upon the value of the secondary life interests; and it is only as to the remainder after the extinction of all the life interests that the present question is raised. Cer-

tainly if it could have been known that there would be no children and that the grantor would be the ultimate survivor of the three, she could not have been taxed upon the creation of the remainder, which was entirely subject to her testamentary power of disposition. The determination of the Commissioner is reversed.

The petitioners argue also that they may not be taxed upon the value of the remainders because there were no donees in existence, and that they may not be taxed as upon gifts because the creation of the trusts was a reciprocal arrangement each in consideration of the other. These questions do not require decision.

Decision will be entered under Rule 50.

[fol. 30] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

META BIDDLE ROBINETTE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION—July 8, 1941

Subsequent to the Board's report, promulgated June 10, 1941, the respondent filed a computation which the petitioner agrees is in accordance with the said report. It is, therefore,

Ordered and Decided that there is no deficiency in gift tax for 1936.

Enter.

Entered July 8, 1941.

(S.) J. M. Sternhagen, Member.

[fol 31] [File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT

B. T. A. No. 103009

[Title omitted]

PETITION FOR REVIEW—Filed September 24, 1941

Guy T. Helvering, United States Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Third Circuit to review the decision entered by the United States Board of Tax Appeals on July 8, 1941, ordering and deciding that there is no gift tax due from Meta Biddle Robinette, respondent on review, for the calendar year 1936. This petition for review is filed pursuant to the provisions of Section 1141 and Section 1142 of the Internal Revenue Code.

Meta Biddle Robinette, respondent on review, filed her gift tax return for the year 1936 with the Collector of Internal Revenue for the First Pennsylvania District at Philadelphia, Pennsylvania, the office of which Collector is within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

(S:) Samuel O. Clark, Jr., Assistant Attorney General; (Signed) J. P. Wenchel CAR, Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner.

VFW/mer 8/16/41.

(fol. 32)

[File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT

B. T. A. No. 103009

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed September
26, 1941

To Henry A. Mulcahy, Esq., 30 Broadway, New York, New
York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) R. D. Gamble, Clerk, United States Board of
Tax Appeals.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 25th day of September, 1941.

(S.) Henry A. Mulcahy, Attorney for Respondent on
Review.

VFW/mer 8/16/41.

[fols. 33-67]. [File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT

B. T. A. No. 103009

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed October 6,
1941

To Meta Biddle Robinette, 12 E. Chestnut Avenue, Chestnut
Hill, Philadelphia, Pa.:

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) J. P. Wenchel, CAR, Chief Counsel, Bureau
of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 29th day of September, 1941.

(Sgd.) Meta Biddle Robinette, Respondent on Review.

VFW/mer 8/16/41.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

B. T. A. Docket No. 103009

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner on Review,

v.

META BIDDLE ROBINETTE, Respondent on Review

B. T. A. Docket No. 103010

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner on Review,

v.

ELISE BIDDLE PAUMGARTEN, Respondent on Review

CORAM: BIGGS AND MARIS, JJ.:

ORDER OF CONSOLIDATION—December 1, 1941

Now on consideration of the joint motion filed herein by counsel for the respective parties to the above-entitled proceedings, it is

Ordered, that the above-entitled proceedings be and they are hereby consolidated for briefing, hearing, argument, and decision upon a single consolidated transcript of record to be certified and transmitted to this Court by the Clerk of the United States Board of Tax Appeals.

It is further ordered that the Clerk of this Court transmit to the Clerk of the United States Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

Enter.

For the Court, John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 69] Clerk's Certificate to foregoing order omitted in printing.

[fol. 70] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

ELISE BIDDLE PAUMGARTEN, Formerly Known as ELISE BIDDLE ROBINSON, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Henry A. Mulcahy, Esq.

For Comm'r: Eugene G. Smith, Esq.

DOCKET ENTRIES

May 28. Petition received and filed. Taxpayer notified.
Fee paid.

" 28. Copy of petition served on General Counsel.

Jul. 25. Answer filed by General Counsel.

" 25. Request for hearing in Philadelphia filed by General Counsel.

Aug. 1. Notice issued placing proceeding on Philadelphia calendar. Answer and request served.

Oct. 11. Hearing set Dec. 2, 1940 in Philadelphia, Pa.

Dec. 5. Hearing had before Mr. Sternhagen on the merits. Submitted. Motion to consolidate with docket 103009 granted. Stipulation as to the facts filed. Briefs due 1/20/41—reply 2/4/41.

" 26. Transcript of hearing of 12/5/40 filed.

1941

Jan. 16. Motion for extension to Feb. 1, 1941 to file brief filed by General Counsel.

" 21. Brief filed by taxpayer.

" 30. Brief lodged by General Counsel.

" 31. Motion of Jan. 16, 1941 to file brief, filed by General Counsel granted to 1/31/41.

Feb. 1. Copy of brief served on General Counsel.

" 4. Motion for extension to Feb. 18, 1941 to file reply brief filed by taxpayer. 2/5/41 granted.

" 18. Reply brief filed by taxpayer.

Jun. 10. Findings of fact and opinion rendered, Sternhagen, Div. 10. Decision will be entered under Rule 50. 6/10/41 copy served.

- “ 27. Computation of deficiency filed by General Counsel.
- “ 30. Hearing set July 16, 1941 on settlement.
- Jul. 2. Consent to settlement filed by taxpayer.
- “ 8. Decision entered, Sternhagen, Div. 10.
- Sep. 24. Petition for review by U. S. Circuit Court of Appeals, Third Circuit, filed by General Counsel.
- “ 26. Proof of service filed.
- Oct. 6. Proof of service filed.
- “ 23. Motion for extension to Dec. 23, 1941 to prepare and transmit record filed by General Counsel.
- “ 23. Order enlarging time to Dec. 23, 1941 to prepare and transmit record entered.
- Nov. 29. Statement of points filed by General Counsel with proof of service thereon.
- “ 29. Agreed statement of evidence filed.
- “ 29. Agreed designation of contents of record filed.
- [fol. 70a]
- 1941
- Dec. 3. Certified copy of order from Third Circuit consolidating for briefing, hearing, argument and decision upon a single consolidated transcript of record filed.

[fol. 71] [File endorsement omitted]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

[Title omitted]

PETITION—Filed May 28, 1940

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency MT-ET-GT-1198-36-1st Pennsylvania, dated March 12, 1940, and, as a basis of her proceeding, alleges as follows:

1. The petitioner is an individual residing at No. 12 East Chestnut Avenue, Chestnut Hill, Philadelphia, Pennsylvania. The return for the period here involved was filed with the Collector for the First District of Pennsylvania on March 15, 1937.

[fol. 72] 2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 12, 1940, as petitioner believes.

3. The taxes in controversy are gift taxes for the calendar year 1936, and in the amount of \$25,044.94.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner of Internal Revenue erred in determining that the transfer made by petitioner of the corpus or principal of the Trust Indenture, dated January 14, 1936, constituted a taxable gift within the meaning of Section 501 of the Revenue Act of 1932, as amended.

b. The Commissioner of Internal Revenue erred in determining that the petitioner had relinquished *in praesenti* her title, dominion and control of the corpus or principal transferred under the Trust Indenture, dated January 14, 1936.

c. The Commissioner of Internal Revenue erred in his determination of the value of the property transferred under the Trust Indenture, dated January 14, 1936.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

[fol. 73] a. On January 14, 1936, petitioner executed an Indenture of Trust and conveyed certain property to others, as Trustees, to pay the income therefrom to petitioner for life, and, on her death, to others for their lives, and on termination of the life estates, to pay over and distribute the corpus or principal of the trust to the issue of the petitioner. On the date of execution and creation of the trust, the petitioner was unmarried and without issue.

b. On January 14, 1936, the date of execution of the transfer in trust, there was no donee in existence to accept the purported gift, which acceptance is necessary to establish a gift *inter vivos*.

c. The Trust Indenture provides that, in default of issue of petitioner, the corpus or principal of the trust is to be paid and distributed to such persons, in such proportions, and for such estates as petitioner, or Edward B. Robinette,

or Meta Biddle Robinette, whichever of said three shall be the survivor, may by Last Will and Testament appoint:

d. The power of appointment reserved by petitioner negatives the relinquishment *in praesenti* of dominion and control of the corpus or principal necessary to establish the purported gift *inter vivos*.

e. The transfer made by petitioner under the Trust Indenture, dated January 14, 1936, did not constitute an absolute and complete *inter vivos* transfer *in praesenti* within the meaning of Section 501 of the Revenue Act of 1932, as amended.

f. The valuation of the property transferred by petitioner in trust on January 14, 1936, as determined by the Commissioner of Internal Revenue did not constitute the fair market value thereof on date of transfer.

[fol. 74] Wherefore, petitioner prays that this Board may hear the proceedings and determine:

1. That the transfer in trust made by petitioner by Indenture, dated January 14, 1936, is not a gift taxable to petitioner.

2. That there is no deficiency in gift tax owed by petitioner for the calendar year 1936.

3. That the petitioner has overpaid her gift taxes for the calendar year 1936; and that the recovery of such overpayment is not barred by the Statute of Limitations.

4. Such other and further relief as this Board may deem just and proper.

Henry A. Mulcahy, Counsel for Petitioner, 50 Broadway, New York City, New York.

[fol. 75] Duly sworn to by Elise Biddle Paumgarten.
Jurat omitted in printing.

[fol. 76]

EXHIBIT "A" TO PETITION

March 12, 1940.

MT-ET-GT-1198-36-1st Pennsylvania

Donor—Elise Biddle Robinson

Elise Biddle Robinson, 12 E. Chestnut Avenue, Chestnut Hill, Philadelphia, Pa.

Dear Madam:

You are advised that the determination of your gift tax liability for the calendar year 1936 discloses a deficiency of \$25,044.94, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Philadelphia, Pa., for the attention of the Chief Estate Tax Office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by
_____, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver. dmu.

[fol. 77] Donor, Elise Biddle Robinson. Year of Gift, 1936

Statement

\$897,637.84 (value of property transferred) x .30617, remainder factor for age 30—\$274,829.78, value of gift.

	Returned	Recommended	Proposed Adjustment
Total gifts, 1936.....	\$ 0.00	\$48,635.52	\$274,829.78
Less exclusions	0.00	0.00	0.00
Amount included	0.00	\$48,635.52	\$274,829.78
Less specific exemption	0.00	40,000.00	40,000.00
Net gifts, 1936	\$ 0.00	\$8,635.52	\$234,829.78
Tax on net gifts	0.00	\$129.53	\$25,174.47
Increase (additional deficiency)			\$25,044.94

[fol. 78] [File endorsement omitted]

UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

[Title omitted]

ANSWER—Filed July 25, 1940

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.
2. Admits the allegations of paragraph 2 of the petition.
3. Admits the allegations of paragraph 3 of the petition.
4. a, b, and c Denies the allegations of paragraphs 4 a, b, and c of the petition.
5. a Admits that on January 14, 1936, the petitioner executed an Indenture of Trust and conveyed certain property to trustees; denies the remaining allegations of paragraph 5 a of the petition.
- b to f. Denies the allegations of paragraphs 5 b to f, inclusive, of the petition.

6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

[fol. 79] Wherefore, it is prayed that the petition be denied.

(Signed) J. P. Wenchel, A., Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Hartford Allen, Division Counsel; Eugene G. Smith, Special Attorney, Bureau of Internal Revenue.

[fol. 80] [File endorsement omitted]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

[Title omitted]

AGREED STATEMENT OF FACTS—Filed December 5, 1940

It Is Hereby Stipulated and Agreed by and between the petitioner and the respondent, by their respective counsel, that the following facts shall be taken as true for the purposes of the above entitled proceeding, with leave to either party to introduce other and further evidence not inconsistent with the facts herein stipulated:

1. The petitioner is an individual residing in Philadelphia, Pennsylvania. On January 14, 1936, the date petitioner executed the Indentures of Trust hereinafter described, she was thirty (30) years of age, unmarried and without issue.

2. That on January 14, 1936, the petitioner, as Grantor, and The Girard Trust Company, Edward B. Robinette and George Earle Robinette, all of the City of Philadelphia, Pennsylvania, as Trustees, entered into an irrevocable Indenture of Trust (hereinafter referred to as the "Girard Trust"); a true copy of which is attached hereto and made a part hereof, marked Exhibit "A".

[fol. 81] 3. That on January 14, 1936, the petitioner, pursuant to the provisions of the Girard Trust, assigned, transferred and set over unto the Trustees the property set

forth in Schedule A annexed to and made a part of the said Indenture, of the then market value of \$680,928.68.

4. That on January 14, 1936, the petitioner, as Grantor, and The Pennsylvania Company for Insurances on Lives and Granting Annuities, Edward B. Robinette and George Earle Robinette, all of the City of Philadelphia, Pennsylvania, as Trustees, entered into an irrevocable Indenture of Trust (hereinafter referred to as the "Pennsylvania Trust"), a true copy of which is attached hereto and made a part hereof, marked Exhibit "B".

5. That on January 14, 1936, the petitioner, pursuant to the provisions of the Pennsylvania Trust, assigned, transferred and set over unto the Trustees the property set forth in Schedule A annexed to and made a part of said Indenture, of the then market value of \$216,709.16.

6. The provisions of the trust indentures marked Exhibits "A" and "B" are similar in all respects, except as to the amount and classification of the properties transferred thereunder.

7. Under the terms of the trust indentures, the Trustees are to pay the entire income from both of the trusts to the petitioner during her life, and on her death to pay over the distribute the net income monthly to Meta Biddle Robinette (her mother), and to Edward B. Robinette (her father), share and share alike, and on the death of either of the latter, to pay the net income to the survivor.

[fol. 82] 8. Under the terms of the trust indenture, the Trustees are directed, on the termination of the life estates aforementioned, to pay over and distribute the corpus or principal of the trusts to the issue of the petitioner, to be divided among such issue *per stirpes* upon the attainment by such issue, respectively, of the full age of 21 years, and, in default of issue of the Grantor, then to such persons, in such proportions, and for such estates as petitioner, or Meta Biddle Robinette, or Edward B. Robinette, whichever of said three shall be the survivor, may, by Last Will and Testament duly proved and allowed, direct, limit and appoint.

9. The petitioner, on March 15, 1937, filed gift tax returns for the calendar year 1936 in the office of the Collector of Internal Revenue for the First District of Philadelphia,

Pennsylvania. The returns filed by the petitioner disclosed the execution of the trust indentures on January 14, 1936, and disclaimed any gift a liability thereunder.

10. Upon audit of said gift tax returns the respondent determined that a gift occurred as to the life estates transferred to Meta Biddle Robinette and Edward B. Robinette. Said life estates were valued at \$48,635.52, which resulted in a deficiency tax of \$129.53. Petitioner paid the alleged additional tax.

11. Thereafter on or about March 12, 1940, the respondent, by ninety-day letter, notified the petitioner of his [fols. 83-105] determination that a gift occurred on January 14, 1936, as to the remainder interest under the trust, thereby resulting in an additional deficiency in tax of \$25,044.94. The value of the remainder was fixed at \$274,829.78 after applying the remainder factor .30617 for age 30 to the value of the property transferred. A true copy of said deficiency letter is attached to the petition herein and is by reference made a part hereof.

(Signed) Henry A. Mulcahy, Counsel for Petitioner.

(Signed) J. P. Wenchel,—a, Chief Counsel, Bureau of Internal Revenue.

"EXHIBIT A" AND SCHEDULE "A" THERETO TO THE AGREED STATEMENT OF FACTS OMITTED IN PRINTING

[fol. 106] UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

ELISE BIDDLE PAUMGARTEN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—July 8, 1941

Subsequent to the Board's report, promulgated June 10, 1941, the respondent filed a computation which the petitioner agrees is in accordance with the said report. It is, therefore,

Ordered and Decided that there is no deficiency in gift tax for 1936.

Enter: Entered July 8, 1941.

(S.) J. M. Sternhagen, Member. (Seal.)

[fol. 107] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT

B. T. A. No. 103010

[Title omitted]

PETITION FOR REVIEW—Filed September 24, 1941

Guy T. Helvering, United States Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Third Circuit to review the decision entered by the United States Board of Tax Appeals on July 8, 1941, ordering and deciding that there is no gift tax due from Elise Biddle Paumgarten, respondent on review, for the calendar year 1936. This petition for review is filed pursuant to the provisions of Section 1141 and Section 1142 of the Internal Revenue Code.

Elise Biddle Paumgarten, respondent on review, filed her gift tax return for the year 1936 with the Collector of Internal Revenue for the First Pennsylvania District at Philadelphia, Pennsylvania, the office of which Collector is within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

VFW/mcr 8/16/41.

(S.) Samuel O. Clark, Jr., Assistant Attorney General. (Signed) J. P. Welch, CAR, Chief Counsel, Bureau of Internal Revenue. Attorneys for Petitioner.

[fol. 108] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT

B. T. A. No. 103010

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed September
26, 1941

To: Henry A. Mulcahy, Esq., 50 Broadway, New York,
New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) B. D. Gamble, Clerk, United States Board
of Tax Appeals.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 25th day of September, 1941.

(Signed) Henry A. Mulcahy, Attorney for Respondent on Review.

VFW/mer 8/16/41.

[fols. 109-112] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT

B. T. A. No. 103010

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed October 6,
1941

To: Elise Biddle Paumgarten, 12 E. Chestnut Avenue,
Chestnut Hill, Philadelphia, Pa.

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) J. P. Wenchel, CAR; Chief Counsel, Bureau
of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 29th day of September, 1941.

(Sgd.) Elise Biddle Paumgarten, Respondent on
Review.

VFM/mer 8/16/41.

[fols. 113-114] Clerk's Certificates to foregoing transcript
omitted in printing. (Seal.)

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 7894

October Term, 1941

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

VS.

META BIDDLE ROBINETTE, Respondent.

No. 7895

October Term, 1941

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

VS.

ELISE BIDDLE PAUMGARTEN, Respondent.

MINUTE ENTRY OF ARGUMENT

And afterwards, to wit, the 6th day of March, 1942, come the parties aforesaid by their counsel aforesaid; and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 23d day of March, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 116] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7894-7895

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

VS.

META BIDDLE ROBINETTE, Respondent

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

VS.

ELISE BIDDLE PAUMGARTEN, Respondent.

ON Petitions for Review of Decisions of the United States
Board of Tax Appeals

OPINION—Filed March 23, 1942

Before Biggs, Clark, and Jones, Circuit Judges

[fol. 117] CLARK, Circuit Judge:

In 1936 the younger respondent was contemplating marriage. To make sure that the family fortune would follow the line of descent the three trusts in the case at bar were established by her and her mother, the older respondent. By the terms of two of these instruments properties were irrevocably transferred to trustees by the daughter. Her trustees were to pay the entire income from the trusts to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either to the survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor per stirpes, upon their reaching the age of twenty-one, and in default of such issue, then to such persons, and in such proportions, and for such estates as the survivor of the three life tenants should by will appoint. The mother likewise transferred property irrevocably to trustees pursuant to an instrument similar to the above except for the fact that the order of the life estates was mother, husband and daughter. After gift taxes had been paid on the life

estates, the Commissioner assessed deficiencies based upon the remainder interests in these trusts. From a holding by the Board of Tax Appeals that the remainder interests did not constitute taxable gifts the Commissioner has appealed.

The separate enactment of the income, estate, and gift taxes and the piecemeal amendment of all three "to meet specific avoidance situations" has resulted in a lack of correlation.¹ This lack is of course not overlooked by taxpayers. The case at bar presents one such effort. This² and other recent decisions of the Board of Tax Appeals³ [fol. 118] have, we might say, distinctly implemented that effort. The Board has taken the view that the gift tax does not apply wherever the gift might be included in the donor's estate for purposes of the estate tax. From this they conclude that no gift tax may be imposed where the settlor retains a possible power of testamentary disposition. They assert that this holding follows inevitably from certain language in the then Mr. Justice Stone's opinion in *Estate of Sanford v. Commissioner*:

"There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together."

308 U. S. 39, 44.

¹ Greenfield, *Correlation of Federal Income, Estate and Gift Taxes*, 16 Temple University Law Quarterly 194; Warren, *Correlation of Gift and Estate Taxes*, 55 Harvard Law Review 1.

² *Meta B. Robinette*, 44 B. T. A. 701.

³ *Margaret Marshall*, 43 B. T. A. 99; *Carl Schmidlapp*, 43 B. T. A. 829; *Morris Michel*, 43 B. T. A. 1036. Prior to the Supreme Court decision in *Sanford v. Commr.* 308 U. S. 39 the Board had held *contra*, *William Walker*, 40 B. T. A. 761.

Discussing this passage a writer in the Columbia Law Review poses and answers some questions:

"These sentences are addressed primarily to a case in which the settlor had reserved powers over the disposition of the entire property in question. Will they be given general application to cases in which the transferor has retained a sufficient interest in the property to require its inclusion in his gross estate, but has not retained powers over the ultimate disposition of all of it? . . . Nevertheless, the wife has clearly acquired a valuable interest at the time the tenancy was created, and it is not at all subject to reserved powers in the husband. The value of the gift is not the full value of the property, but both in common parlance and in legal contemplation a completed gift of ascertainable value seems to have been made.

[fol. 119] "A narrower test than that posed above may be evolved from the consideration of cases of joint tenancies, and of transfers containing reservations by the transferor of various other interests. . . . Has the transferor completely relinquished, *inter vivos*, ownership and control of interests in the property having an ascertainable value? If he has, a gift tax may be applied, even though the estate tax may also be applicable. On the whole, this narrower test seems more reasonable than a determination that, except for transfers in contemplation of death, the gift tax only applies if the estate tax does not. For there are a good many instances of transfers during life which for purposes other than gift taxation are everywhere regarded as completed gifts, but which are nevertheless includable in the gross estate. It seems that the gift tax should apply to transfers of this character; and accordingly that the coordination of the gift tax and estate tax statutes in these instances should be effected by changes in the latter, not by a judicial interpretation of the former that brings it out of line with the general law. . . .

"Are *inter vivos* transfers in which the settlor has reserved to himself some reversionary interest subject to a gift tax as well? If the gift tax is merely supplementary to the estate tax, it is quite arguable that no gift tax can be imposed. These cases seem to be distinguishable, however, from the situation of the *Sanford* case, for reasons already outlined. A valuable irrevocable interest in another has been created by the settlor. There is no power in him

to get it back; so long as the beneficiaries live, they will enjoy the income of the property, free from his control. Hence it seems that, to the extent of the value of the interests created in donee-beneficiaries, there is a taxable gift."

Magill, *The Federal Gift Tax*, 40 *Columbia Law Review* 773, 783, 787

[fol. 120] We confess that we agree with these answers and further believe that the case at bar is embraced therein. The respondent settlors retained no economic control over the trusts except for the possibility that during the settlors' lifetime the life tenants die with the younger respondent remaining childless. Thus, the settlors could not themselves bring about the exercise of their powers of appointment without committing a crime. This view is supported by the recent decision of Judge Frank in *Commissioner v. Marshall*⁴ and is the one taken by a tax expert writing in the *Harvard Law Review*:

"It thus appears that such a reversionary interest in the grantor would not prevent the imposition of a gift tax. Certainly the transfer to a trustee of property over which the grantor only reserves a possibility of reverter (irrespective of its proximity or remoteness) constitutes such a transfer of property as is covered by the gift tax. If the gift tax is merely supplementary to the estate tax, of course no gift tax can be levied, but these trusts are distinguishable from the trusts in the *Sanford* case because here the grantor reserved no economic control."

Warren, *Correlation of Gift and Estate Taxes*, 55 *Harvard Law Review* 1, 25.

We are not disturbed by the fact that no donees of the reversionary interest were in existence at the date of the creation of the trust. The tax is primarily payable by the donor on his transfers by gift⁵ and not by the donees on their receipts.⁶ Since the donors have irrevocably parted with the property, the tax should attach even though the

⁴ C. C. A. 2d, Feb. 3, 1942, reversing *Margaret Marshall*, note 3 *supra*.

⁵ Int. Rev. Code §1008(a).

⁶ The tax remains a lien on the gift and if not paid the donee may be liable. Int. Rev. Code §1009.

donees are not wholly ascertainable.⁷ In the words of our previously quoted Mr. Warren:

[fol. 121]. "The taxable event is, therefore, the irrevocable divestment of all the donor's rights in the property, rather than the irrevocable vesting of rights in particular beneficiaries."

Warren, *Correlation of Gift and Estate Taxes*, 55 *Harvard Law Review* 1, 15.

Taxpayers also argue that the transfers were made for "adequate and full consideration in money or money's worth."⁸ In so doing they are talking about one thing while the statute is talking about another. Concededly mutual promises may be consideration for a contract in the common law sense.⁹ The legislative history and perhaps even the words of the statute give a contrary meaning:

"The tax is designed to reach all transfers to the extent that they are donative and to exclude any consideration not reducible to money or money's worth."

H. R. Rep. No. 708, 72d Cong., 1st Sess. (1932) p. 29;
Sen. Rep. No. 665, 72d Cong., 1st Sess. (1932) p. 41.

This view is further supported by a history of the cognate acts. The Revenue Act of 1924 permitted a deduction from the estate tax for claims against the estate which were "incurred or contracted bona fide and for a fair consideration in money or money's worth."¹⁰ The 1926 Act changed the words "fair consideration" to the present statutory words, "adequate and full consideration."¹¹ The cases under this cognate estate tax provision limit "adequate and full consideration" to liabilities founded upon

⁷ See Treasury Regulations 79, Art. 3 (1936) as amended by T. D. 5010, 1940-2 Cum. Bull. 293. Cf. *Herzog v. Commr.*, 116 F. (2d) 591.

⁸ Int. Rev. Code §1002.

⁹ 1 Williston, *Contracts* § 103.

¹⁰ Revenue Act of 1924 Sec. 303(a)(1).

¹¹ Revenue Act of 1926 Sec. 303(a)(1). Int. Rev. Code §811.

contract.¹² A family agreement regarding testamentary [fol. 122] dispositions does not meet this statutory requirement of consideration.¹³ Likewise an exchange of such promises does not constitute the necessary "adequate and full consideration in money or money's worth" as used in the gift tax. The essential quality of these transfers was the disposition of property by way of gift. The concerted action of the taxpayers in no way affects that quality.¹⁴

The decisions of the Board of Tax Appeals are reversed.

[fol. 123] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7894

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

META BIDDLE ROBINETTE, Respondent

JUDGMENT—March 23, 1942

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

William Clark, Circuit Judge.

March 23, 1942.

[File endorsement omitted.]

¹² See H. R. Rep. No. 708, 72d Cong., 1st Sess. p. 48; Sen. Rep. No. 665, 72d Cong., 1st Sess., p. 51.

¹³ Markwell's Estate v. Commr., 112 F. (2d) 253; Estate of F. A. Gray, 44 BTA 545. See also Latty v. Commr., 62 F. (2d) 952.

¹⁴ Commr. v. Bristol, 121 F. (2d) 129.

[fol. 124] IN THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7895

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

ELSIE BIDDLE PAUMGARTEN, Respondent

JUDGMENT—March 23, 1942

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

William Clark, Circuit Judge.

March 23, 1942.

[File endorsement omitted.]

[fol. 125] IN THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7894-7895

[Title omitted]

PETITION FOR REHEARING—Filed April 7, 1942

The respondents herein respectfully make application for a rehearing and reconsideration of these cases.

The opinion of this Court was promulgated and the judgment was entered on March 23, 1942, reversing the decisions of the Board of Tax Appeals.

[File endorsement omitted.]

[fol. 126] The issue involved in these cases is whether the transfers of the remainder interests made by the respondents under the irrevocable indentures of trust dated Janu-

ary 14, 1936, constituted taxable gifts in the year 1936, within the meaning of Sections 501 *et seq.* of the Revenue Act of 1932, as amended.

In support of this petition for rehearing, respondents respectfully show:

I

It is respectfully suggested that in reversing the decisions of the Board of Tax Appeals this Court has omitted (apparently through oversight) to allow the respondents the right to deduct the value of the retained reversions for the purpose of computing the value of the alleged gifts, i.e., the remainders.

Counsel for the petitioner, in his argument and in his brief conceded that in computing the value of gifts in trust, allowance must be made for the value of the donor's reversionary interest. The Court will recall that on the argument petitioner's counsel submitted an oral computation of the value of the remainder interests upon which a gift tax was claimed, which computation included therein and made provision for an allowance or credit equal to the value of the respondents' reversionary interests.

The value of the reversionary interests retained by each of the donors herein can be readily and easily ascertained by a reference to the accepted mortality or actuarial tables. Such a computation has not been necessary prior to this Court's opinion of March 23, 1942, for the reason that the petitioner was seeking to levy a gift tax on the full value of the corpus of each trust without allowance for the reversionary interests in the settlors and the Board of Tax Appeals had agreed with the respondents that the petitioner's determination was made in error.

[fol. 127] ~ The following excerpts from the opinion indicate that this Court recognized that the value of the reversionary interests ought to be deductible in ascertaining the value of the alleged gifts, i.e., the remainders:

Page 3:

"The value of the gift is not the full value of the property, but both in common parlance and in legal contemplation a completed gift of ascertainable value seems to have been made."

Page 4:

"Are *inter vivos* transfers in which the settlor has reserved to himself some reversionary interest subject to a gift tax as well? . . . Hence it seems that, to the extent of the value of the interests created in donee-beneficiaries, there is a taxable gift."

Page 5:

"The respondent settlors retained no economic control over the trusts *except* for the possibility that during the settlors' lifetime the life tenants die with the younger respondent remaining childless. . . .

"It thus appears that such a reversionary interest in the grantor would not prevent the imposition of a gift tax."

We are not disturbed by the fact that no donees of the reversionary (remainder?) interest were in existence at the date of the creation of the trust."

It is respectfully suggested that in view of the foregoing, this Court should not have reversed the decisions of the Board but should, at most, have modified them with instructions to the Board to take further evidence with respect to the value of such reversions.

[fol. 128]

II

It is further respectfully suggested that in rendering its opinion in these cases the Court has misinterpreted the arguments and the issues involved herein, particularly those with reference to the reversions and remainders. At the bottom of page 5 of its opinion the Court has stated:

"We are not disturbed by the fact that no donees of the reversionary interest were in existence at the date of the creation of the trust. The tax is primarily payable by the donor on his transfers by gift and not by the donees on their receipts. Since the donors have irrevocably parted with the property, the tax should attach even though the donees are not wholly ascertainable."

The attention of the Court is particularly called to the words "reversionary interest" in the foregoing extract from the opinion. This was apparently intended to read "remainder interests".

A reversion has been defined to be "the residue of an estate left in the grantor or his heirs, or in the heirs of the testator, commencing in possession on the determination of one or more particular estates granted or devised".

A remainder has been defined to be "a future estate dependent upon a precedent estate".

Hence a reversion is an estate retained by the grantor. It is not a transfer, and involves no donees. A remainder is a transferred estate which may under certain circumstances vest in another, and therefore involve donees. To subject a reversion to a gift tax would be tantamount to taxing a gift to oneself.

The only issue presented to the Court on this appeal was, in the wording framed by the petitioner in his brief (p. 3), whether the respondents are subject to gift tax under Sections 501 and 506 of the Revenue Act of 1932 *upon the value of the remainders* at the time of the establishment of the trust. See also the respondents' brief (p. 2).

[fol. 129] The Court, as shown above, discusses and concedes the existence of a reversion in each of the respondent donors and concludes that such reversionary interests should not prevent the imposition of a gift tax, but at the same time omits to specify that the gift tax, should attach only to the remainders after due allowance for the reversions.

Having thus concluded, the Court then states it is not disturbed by the fact that no donees of the reversionary interests were in existence at the date of the creation of the trusts. Neither the petitioner nor the respondents has contended that there were no donees of the reversionary interests in existence on the date of the creation of the trusts and no such contention could be made since such interests were retained by the respondent settlors. In the words of the quotation on page 6 of the opinion, "The taxable event is, therefore, the irrevocable divestment of all the donor's rights in the property, . . ." A reversion being a retained estate, no divestment thereof can be asserted. The issue raised by the respondent's brief (pp. 12-17) was that no donees of the remainder interests as distinguished from the reversionary interests were in existence on the date of the creation of the trusts and that therefore a gift of such remainders could not have been effected.

If the Court's opinion herein is to be accepted at its face value and to be interpreted to mean that reversionary in-

terests are subject to a gift tax, then it is contrary to the gift tax law, regulations and decisions which specifically exempt such interests from the tax.

III

It is also respectfully suggested that the Court erred as a matter of law in holding that "the tax should attach even though the donees are not wholly ascertainable."

The Court supported its decision on this point by a reference to Treasury Regulations 79, Art. 3 (1936), as [fol. 130] amended by T. D. 5010, 1940-2 Cum. Bull. 293. As was pointed out in the respondents' brief, Article 3 of Regulations 79 in the form referred to is not applicable to the instant cases since that regulation only became effective on February 26, 1936, and affected transfers on and after that date, whereas the instant transfers occurred on January 14, 1936.

The illegality of the previous edition of Article 3 of Regulations 79 was fully covered on pages 16 and 17 of the respondents' brief.

In holding that the tax should attach even though the donees are not wholly ascertainable, the Court is disregarding the decisions in *Porter v. The Comm'r*, 288 U. S. 436, wherein it was held:

"A gift is a bi-lateral transaction and requires a donee as well as a donor. It is incomplete though the donor has parted with his interest if the donee remains indeterminate and the beneficiaries are determined only when the power to change them ends."

and in *McBrier v. Comm'r*, (3rd Cir.) 106 Fed. (2d) 967 (written by Clark, Circuit Judge, who wrote the opinion in the instant cases), wherein it was held:

"Furthermore, it has been recognized that where a settlor has irrevocably transferred property to a trust, reserving only the power to change the beneficiary to persons other than himself, there is no taxable gift since the *cestuis que trust* are not finally determined, and a gift requires a definite donee."

No case decided by the United States Supreme Court, thus far, has accepted the doctrine propounded by Warren and relied upon by this Court to the effect that the irre-

vocable divestment of all of the donor's rights in the property rather than the irrevocable vesting of rights in particular beneficiaries, determines the taxable event (Opinion, p. 6; cf. also p. 5). In fact the *Saxford* case cannot be interpreted otherwise than as rejecting this theorist doctrine.

[fol. 131] It is therefore respectfully submitted that this application for a rehearing be granted and that these cases be set down for reargument.

Respectfully submitted, Henry A. Mulcahy, Attorney
for Respondents.

CERTIFICATE OF COUNSEL

I, the attorney of record for the respondents herein, certify that this petition for rehearing is presented in good faith and not for delay.

Dated, New York, April 4th, 1942.

Henry A. Mulcahy, Attorney for Respondents.

[fol. 132] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 7894

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING—April 21, 1942

And Now, to wit, April 21, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia,

John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 133] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 7895

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING—April 21, 1942

And Now, to wit, April 21, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia,

John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 134] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 7894-7895

[Title omitted]

MINUTE ENTRY OF REARGUMENT—May 5, 1942

And afterwards, to wit, the 5th day of May, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 30th day of July, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 135] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7894

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

META BIDDLE ROBINETTE

No. 7895

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

ELISE BIDDLE PAUMGARTEN

On Petitions for Review of Decisions of the United States
Board of Tax Appeals

OPINION UPON REHEARING—Filed July 30, 1942

Before Biggs, Jones and Goodrich, *Circuit Judges*

[fol. 136] GOODRICH, *Circuit Judge*:

In our previous decision in this case we decided that the remainder interests, created by the trust agreements there involved, constituted taxable gifts. We granted a rehearing when the taxpayers pointed out that no allowance was made for the grantors' reversionary interests in calculating the value of the remainders. Other points were also pressed, but we do not discuss them again here because we believe they were correctly determined in the original opinion, to which we adhere.

The grantors were mother and daughter. Each of the trust indentures created a life estate for the grantor, succeeding life estates, and then provided for the distribution of the corpus to the daughter's issue at majority. In default of such issue, general powers of testamentary appointment were given to the last surviving life tenant. The taxpayers contend that at the least they are entitled to have the cases remanded to the Board to compute the value of

the reversionary interest remaining in the grantor of each trust. This they contend must be deducted in order to furnish the proper determination of the value of the remainders. The Commissioner, on the other hand, contends that whatever either taxpayer has left by way of reversion is too contingent and remote to be valued. It is to be borne in mind that the question here is the valuation of the remainders created in each of these two deeds of trust. According to the Regulations¹ it is made on the basis of the "present value of \$1 due at the end of the year of death of a person of specified age". Such an evaluation is a matter of calculation from the facts and figures already in the record in these cases. The sum thus arrived at is not affected by the fact that the daughter-grantor may never have children who attain the age of majority and thus become eligible to receive these gifts. The terms of the indentures were direct and unqualified and the gifts thus made are not under the [fol. 137] control of either grantor in any way. Only if no child of the daughter-grantor attains the age of majority does the survivor among the life tenants have any opportunity for the exercise of the power of appointment. Failing such appointment there would be, presumably, a distribution of the corpus to the next of kin of the grantor of each trust. In any event, however, if these remainders vest in the children of the daughter-grantor their value is not lessened in any way by what might happen if there were no children to take it. If they get the gifts at all they get the whole of them. The reversionary interests cannot in any way defer the time when the gifts will vest; nor can they defeat the latter. We think, therefore, that each of the respective settlors made such a gift as makes the whole taxable, subject, of course, to the reserved life estate. The cases do not need to be sent back for an evaluation of the reversionary interests.

Differing terms found in instruments creating trusts of course make for differing results on this point. Thus, in *Commissioner of Internal Revenue v. Marshall*, 125 F. (2d) 943 (C. C. A. 2; 1942), there was a provision for distribution to the settlor if living upon the death of the life beneficiary and, if not, then to other beneficiaries. However, in neither the *Marshall* case nor *Hughes v. Commissioner of Internal*

¹ Treas. Reg. 79, Art. 19(7) and Table A.

Revenue, 104 F. (2d) 144 (C. C. A. 9, 1939), where similar reversionary interests were involved, is there a determination of this exact point. Cf. *Herzog v. Commissioner of Internal Revenue*, 116 F. (2d) 591 (C. C. A. 2, 1941). *Commissioner of Internal Revenue v. McLean*, — F. (2d) — (C. C. A. 5, 1942) which comes close to the facts of this case was sent back to the Board of Tax Appeals to determine the value of that which the court felt was not included in the gift. We think that in our case each settlor gave away the whole estate and only in the event that the gift failed by reason of subsequent events would either have any further concern with its disposition. We conclude, therefore, that the tax was properly based upon the method adopted by the Commissioner.

[fol. 137a]. The order of the Court upon rendering the first opinion in this case was that "The decisions of the Board of Tax Appeals are reversed". We affirm that order.

[fol. 138] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 139] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

[Title omitted]

STIPULATION AS TO RECORD—October 27, 1942

The parties herein, by their counsel, respectively, do hereby stipulate and agree for the purpose of the petition for writs of certiorari filed herein:

1. That the petition may be considered upon Appendix B to the Brief of the Commissioner, as supplemented by the proceedings in the United States Circuit Court of Appeals for the Third Circuit;

2. That the original record shall be lodged with the Supreme Court of the United States;

3. That in the event the petition is granted, counsel will then stipulate to print from said original record, those parts that they deem material.

4. It is further stipulated that either party may refer in their briefs and oral argument to any part of the original record filed in the Supreme Court of the United States which has not been printed.

[fol. 140] Charles Fahy, Solicitor General of the United States, Attorney for Respondent... Henry A. Mulcahy, Guilford S. Jameson, Attorneys for Petitioners.

October 27, 1942.

[fol. 141] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 499

ORDER ALLOWING CERTIORARI—Filed December 7, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 429, Smith vs. Shaughnessy, Collector of Internal Revenue, etc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 142] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 500

ORDER ALLOWING CERTIORARI—Filed December 7, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Nos. 429 and 499.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 143] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1942

[Title omitted]

STIPULATION AS TO PRINTING RECORD—Filed December 10,
1942

Subject to this court's approval, it is stipulated that for the consideration of these cases on writs of certiorari to the Circuit Court of Appeals for the Third Circuit, granted December 7, 1942; the printed record may consist of the following:

1. As to No. 499—

Docket Entries (R. 1-1A)

Petition to Board of Tax Appeals, including Exhibit A
(R. 2-8)

Answer (R. 9-10)

Agreed Statement of Facts, including Exhibit A but excluding Schedule A thereto (R. 11-22)

Findings of Fact and Opinion of Board of Tax Appeals
(R. 26-29)

Decision (R. 30)

Petition for Review with Notices of Filing (R. 31-33)

Order of Consolidation in Circuit Court of Appeals (R. 68)

2. As to No. 500—

Docket Entries (R. 70-70A)

Petition to the Board of Tax Appeals, including Exhibit A
(R. 71-77)

Answer (R. 78-79)

Agreed Statement of Facts, omitting Exhibits A and B
(R. 80-84)

Decision (R. 106)

Petition for Review and Notices of Filing (R. 107-109)

[fol. 144] 3. The Proceedings in the Circuit Court of Appeals for the Third Circuit as certified by the Clerk of that Court.

4. It is further stipulated that in the briefs and Arguments in the Court, either party may refer to any portion

of the transcript of record which is not included in the portions of the record to be printed as above described.

Henry A. Mulcahy, Guilford S. Jameson, Attorneys
for Petitioners. Charles Fahy, Solicitor General
of the United States, Attorney for Respondent.

Endorsed on cover: File No. 47,000, 47,001. U. S. Circuit Court of Appeals, Third Circuit. Term No. 499. Meta Biddle Robinette, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Term No. 500. Elise Biddle Paumgarten, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for writs of certiorari and exhibit thereto. Filed October 29, 1942. Term Nos. 499, O. T. 1942; 500, O. T. 1942.

(3694)